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ARAMAN JAYA SDN BHD

v.

KUMPULAN A BESIK SDN BHD

B

HIGH COURT MALAYA, SHAH ALAM
NIK HASMAT MOHAMAD JC
[WRIT SUMMONS NO: MT1(3)-22-474-2000]
25 OCTOBER 2010

C ***COMPANY LAW:*** *Directors - Resolutions - Effect of resolutions - Whether company compelled to carry out matters stated in resolution - Whether resolution may amount to a contractual undertaking by company - Whether resolution has binding effect on company*

D ***CONTRACT:*** *Form of contract - Directors' resolutions - Whether directors' resolution may amount to a contractual undertaking by company - Whether resolution has binding effect on company*

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Failure to call material witnesses - Whether adverse inference would be drawn*

E

The plaintiff's claim against the defendant was based on a privatization development agreement executed between the Selangor State Government and the defendant for a privatized development project ("the project"). Prior to the execution of the
F agreement, the defendant had passed a company resolution to appoint the plaintiff to develop, manage and handover the project and the plaintiff, by way of a company resolution, had also agreed to accept the contract from the defendant. Pursuant to the parties' understanding, plaintiff initiated and executed preparatory
G works in anticipation of the project and had incurred considerable costs and expenses in the execution of these preparatory works for the project. Despite being subsequently awarded the project by the Selangor State Government, the defendant refused to appoint the plaintiff to the project. The plaintiff claimed against the
H defendant for all costs and expenses incurred by the plaintiff arising from the defendant's refusal and failure to comply with the resolution of the parties. The issues that arose were: (i) whether the directors' resolutions passed by the plaintiff and defendant were valid and enforceable and (ii) whether the plaintiff succeeded
I in proving their claim against the defendant.

Held (allowing the plaintiff's claim with costs):

(1) The plaintiff's and defendant's Board of Director's resolutions contained the parties' clear understanding and intention to enter into legal relations where contractual assurances were respectively made for the purpose of the said privatized project. The contractual promises made by both parties in the resolutions were mutually and financially beneficial to the parties and were clearly supported by consideration. (para 12)

(2) It was incumbent on the defendant to produce witnesses to support the defendant's contention that pending the formal execution of an agreement, parties had never intended to be bound by the terms of their respective director's resolutions. Section 114(g) of Evidence Act 1950 only applies to material and important witnesses. The defendant's directors were clearly important witnesses for the defendant to disprove plaintiff's case and it was therefore, incumbent on the defendant to produce these witnesses to challenge and dispute plaintiff's testimony and not hope for the plaintiff to do so. (para 16)

(3) The plaintiff had duly proven their claim against the defendant that in developing and managing the said privatized project for the defendant, the plaintiff had incurred expenditure and costs including payment of professional consultancy fees, remuneration to the defendant's directors, office rental, renovation costs and purchase of two luxury cars for the use of defendant's two directors. (para 17)

Case(s) referred to:

Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 HC ***(refd)***

Ng Hong Chai v. Teok Ah Kow [2000] 5 CLJ 175 HC ***(refd)***

Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ (Supp) 147 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103, 114(g)

For the plaintiff - Mohaji Selamat; M/s The Law Practice of Mohaji & Hazury

For the defendant - Jasbeer Singh; M/s Jasbeer, Nur & Lee

Reported by Amutha Suppayah

A

JUDGMENT

Nik Hasmat Mohamad JC:

Background Facts

B **[1]** Plaintiff's claim against the defendant was based on a privatization development agreement executed between the Selangor State Government and the defendant for a privatized development project on Lot PT 11050, Lot PT 11051, Lot 5740, Lot 5270, Lot 1925, Lot 5744 and Lot 5743, Mukim Petaling,
C Seri Kembangan, Selangor Darul Ehsan. Prior to the execution of the agreement, the defendant had passed a company resolution to appoint the plaintiff to develop, manage and handover the privatization project of wholesale market and cinema at Bandar Seri Kembangan, Selangor Darul Ehsan, and the plaintiff, by way
D of a company resolution had also agreed to accept the contract from the defendant. Pursuant to the parties understanding, plaintiff initiated and executed prepatory works in anticipation of the project and had incurred considerable costs and expenses in the execution of these prepatory works for the project. Despite being
E subsequently awarded the privatized project by the Selangor State Government, the defendant had failed and/or refused to appoint the plaintiff to the project.

Plaintiff's Claim

F **[2]** Plaintiff's claim against the defendant is for all costs and expenses incurred by the plaintiff to develop and manage the privatized development project for the defendant amounting to RM3,842,109.45. Plaintiff's is further claiming for damages for loss
G of profit due to defendant's refusal and failure to comply with the agreed resolution of the parties, interest at the rate of 8% per annum on the judgment sum from the date of filing of the Writ until full and final settlement and costs. With regard to plaintiff's claim in para. 10(a) of the writ summons, at the onset of the
H hearing on 4 December 2009, plaintiff's counsel had applied orally to the court to withdraw their claim in para. 10(a) of plaintiff's statement of claim which was allowed by this court.

Judgment

I **[3]** The plaintiff succeeded to prove their claim against the defendant on a balance of probability, and accordingly, plaintiff's claim in paras 10(b), (c), (d) is hereby allowed for an amount of RM2.5 million with interests and costs.

Issues

[4] Whether by way of the directors' resolutions passed by the plaintiff and defendant, defendant had agreed to appoint the plaintiff to develop and manage the privatization development project of wholesale market and cinema at Bandar Seri Kembangan, Selangor situated on the land Lot PT 11050, Lot PT 11051, Lot 5740, Lot 5270, Lot 1925, Lot 5744 and Lot 5743, Mukim Petaling, Seri Kembangan, Selangor ("the said privatized project") and whether the parties directors resolutions were valid and enforceable; and

[5] Whether the plaintiff succeeded to prove their claim against the defendant for the amount of RM3,842,109.45 being the cost and expenses incurred by the plaintiff in developing and managing the said privatized project for the defendant.

Court Findings

[6] The company resolutions of the plaintiff and the defendant which had authorized the appointment of the plaintiff to develop and manage the privatized project for the defendant constitute a valid and enforceable contract. The parties resolutions dated 16 March 1993 in exhs. P2, P3, P37 and P38 clearly contained parties' intent and understanding, namely the defendant's appointment of the plaintiff and plaintiff's acceptance of the appointment to develop the privatized project for the defendant. Although the defendant's resolution stated that the understanding is made "subject to the terms and conditions as stated in the agreement", based on the conduct of the parties and the surrounding circumstances alluding the passing of the agreed resolutions, it is clear that the defendant had clearly intended to appoint the plaintiff to develop the privatized project for the defendant upon the terms to be stated in an agreement.

[7] Both parties had discussed the "said privatized project" in a prepatory meeting held at Royal Park Hotel prior to the passing of the parties company resolution, and the parties understanding with regard to the project was further negotiated and developed during the thirty two prepatory meetings held between their respective representatives during the period from 11 September 1996 - 15 May 1997. The meetings were attended by plaintiff's Managing Director, PW1, defendant's authorized representative and director, Mazlin bin Aris and the consultants engaged by the plaintiff for the project. The meetings were specifically held for the

purpose of the said privatized project which was evident from the comprehensive minutes in respect of the progressive works for the said privatized project and pursuant to the prepatory works discussed and executed at these meetings, the project was ultimately awarded by the Selangor State Government to the defendant subject to the terms and conditions specified in the official correspondences of Petaling District Council in exh. P7, and the Selangor State Secretary in exh. P40 dated respectively 17 May 1995 and 7 August 1995.

[8] The plaintiff had succeeded to prove that pursuant to the plaintiff's execution of the relevant prepatory works, the defendant had obtained and secured the approval for the said privatized project from the Selangor State Government. Based on the project paper and working proposal which was prepared and developed for the project by the plaintiff and the consultants engaged for the project, the defendant had obtained and secured approval for the privatized project as early as 28 February 1995 as exhibited in P6.

[9] The plaintiff have further proved that all the expenses and costs incurred by the plaintiff was for the preparation and development of the said privatized project for the defendant as was agreed by both parties in their respective resolutions. In this regard, a Privatization Development Agreement was subsequently signed between the defendant and the Selangor State Government on 6 November 1997, barely six months after the parties' last meeting on 15 May 1997.

Grounds Of Judgment

Issue 1

Whether The Parties Agreed Resolutions Were Legally Binding And Constitute A Valid And Enforceable Contract

[10] It is an established legal principle that he who alleges, must prove the allegation and the onus is on the defendant to discharge such proof. During the court proceeding on 4 December 2009, 28 December 2009, 29 December 2009, 5 January 2010, 28 January 2010, 1 February 2010, 24 February 2010, 25 February 2010, 12 March 2010, 22 March 2010, 29 March 2010, 12 April 2010, 26 April 2010 and 30 April 2010, the plaintiff had produced six witnesses to support their claim that through their respective directors' resolutions, both parties had

entered into a legal relationship for the purpose of securing the privatized project for the defendant and that the agreed resolution constitute a valid and enforceable contract. For the purpose of civil proceeding, the legal burden to establish the claim under ss. 101, 102 and 103 of the Evidence Act 1950 is clearly on the plaintiff. In the case of *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ (Supp) 147, Augustine Paul, JC held:

> It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party. When the burden shifts to the other party, it can be discharged by cross examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods ...

[11] In determining whether or not parties had intended to enter into a legal relation and whether the parties resolution is legally binding and enforceable, reference is made to the case of *Ng Hong Chai v. Teok Ah Kow* [2000] 5 CLJ 175, where Justice Malik Ishak held:

> Now, there are two types of contract, formal or informal. Formal contracts may be reduced in writing while others are said to be informal. To constitute a valid contract, there must be separate and definite parties thereto; those parties must be in agreement, that there must be *consensus ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

[12] In this regard, it is the court's finding that the plaintiff's and defendant's Board of Director's resolutions at exh. P2, P3, P37 and P38 dated 16 March 1993 contained parties' clear understanding and intention to enter into legal relation where contractual assurances were respectively made for the purpose of the said privatized project. The contractual promises made by both parties in the resolutions were mutually and financially beneficial to the parties and were clearly supported by consideration. The defendant's resolution as exhibited in P2 and P37 clearly authorized and appointed the plaintiff, "... Araman Jaya Sdn Bhd to develop and manage the Project for Privatization of a Wholesale Market and Cinema at Bandar Seri Kembangan,

A Selangor Darul Ehsan subject to the terms and conditions as stated in the agreement." The same resolution authorized the appointment of the defendant's director, Tengku Putri Arafiah Ibni Sultan Salahuddin Abdul Aziz Shah and Mazlin bin Aris respectively as plaintiff's director and alternate director in the B plaintiff's company. The plaintiff through their company's resolution similarly dated 16 March 1993 at exh. P3 and P38 accepted the contract from the defendant to develop and manage the project in question. The plaintiff further agreed to the appointment of Tengku Putri as plaintiff's director and shareholder where in C consideration of plaintiff's appointment to the project, Tengku Putri was to be paid a sum of 20% of plaintiff's nett profit from the said project.

Based on the clear content of the parties' resolutions and having D considered the background and surrounding circumstances against which the resolutions were passed, I find that the parties had intended to create a legal relation in anticipation of an award of a financially rewarding privatized project from the Selangor State Government to the defendant. Therefore, for all intent and E purpose, the resolutions that were clearly supported by consideration and were simultaneously passed by both parties on 16 March 1993 were legally binding and enforceable against the defendant.

F **[13]** In this regard, the plaintiff's managing director, PW1 gave evidence that the resolutions were prepared by PW5, was signed sometime in March 1993 and was dated 16 March 1993 by his staff, PW2. PW5, the plaintiff's company secretary confirmed in court that he had prepared the resolution on the instruction of the G defendant's authorized representative, Mazlin bin Aris who, pursuant to P2 and P37 was appointed an alternate director of Tengku Putri. He confirmed that at the time of the passing of the resolution, there were only two directors in the plaintiff's company, namely plaintiff's Managing Director, PW1 and his wife, PW6. He H further confirmed that the defendant's resolution in P3 and P38 was signed by the director, Tengku Putri and defendant's shareholder, Amnah binti Hamzah, whilst the plaintiff's resolution in P2 and P37 was signed by the directors of the plaintiff's company namely PW1, PW6 and the defendant's director, Tengku Putri.

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[14] Further, it was the unchallenged evidence of the plaintiff's witnesses, that prior to the passing of both the director's resolutions, the plaintiff's and the defendant's directors held a prepatory meeting at Park Royal Hotel in 1993 to discuss the said privatized project which was attended by PW1, PW5, defendant's directors Tengku Putri and Mazlin bin Aris, and defendant's shareholder, Amnah binti Hamzah. Both PW1 and PW5 confirmed that the meeting was held to discuss the project and that during the meeting, the plaintiff had agreed to pay both Tengku Putri and Mazlin bin Aris a monthly salary of RM5,000 as directors' emolument. PW5 further confirmed that at the meeting, the defendant's director, Tengku Putri had "directed" plaintiff's Managing Director, PW1 to deal and discuss all matters relating to the implementation of the privatized project with the defendant's authorized representative, Mazlin bin Aris.

[15] In this regard, based on the company search in exh. P4, Mazlin bin Aris was appointed as the defendant's director on 14 April 1995, the appointment date of which significantly coincide with the period in which both parties were actively involved in the prepatory works for the said privatized project. Prior to his appointment as defendant's director, Mazlin bin Aris was Tengku Putri's alternate director as was stated in the defendant's resolution and based on the instruction of Tengku Putri, was the defendant's authorized representative for matters relating to the privatized project. PW1 gave evidence that he had prepared the working project paper and proposal for the privatization project with Mazlin bin Aris which was submitted to the Petaling District Council in exh. P1 and the Selangor State Government in exh. P5. Based on para. 2(b) of exhs. P6 and P7, P40, respectively dated 28 February 1995, 18 May 1995 and 7 August 1995, it was clear that the State Government had approved the said privatized project to the defendant for a concession period of thirty years subject to the terms as stated in Appendix A of exh. P7.

[16] In accordance with s. 103 of the Evidence Act 1950, it is an established legal principle that a person who alleges must prove the allegation and the onus is on the other party to discharge the proof. In this regard, the defendant failed in cross examination to challenge and rebut plaintiff's assertion and had failed to produce vital witnesses for their defence namely, the defendant's authorized representative, Mazlin bin Aris and defendant's director, Tengku Putri. It is incumbent on the defendant to produce these crucial

witnesses to support defendant's contention that pending the formal execution of an agreement, parties had never intended to be bound by the terms of their respective director's resolutions. Section 114(g) of Evidence Act 1950 provides:

> Court may presume
>
> (g) that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.

Section 114(g) of the Evidence Act 1950 only applies to material and important witnesses. The defendant's directors were clearly important witnesses for the defendant to disprove plaintiff's case and it is therefore, incumbent on the defendant to produce these witnesses to challenge and dispute plaintiff's testimony and not hope for the plaintiff to do so. In the case of *Chu Kim Sing & Anor v. Abd Razak Amin* [1999] 4 CLJ 448, Malik Ishak J, held:

> ... the respondent's testimony was not challenged or disputed in cross examination, and the rule is that, wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all.

The defendant's failure to dispute plaintiff's assertion during the cross examination of plaintiff's witnesses and defendant's failure to secure the attendance of their vital witnesses without reason and without any apparent effort, was found to be fatal to their case and for this reason, the adverse inference under s. 114(g) of the Evidence Act 1950 is invoked against the defendant.

Issue 2

Whether The Plaintiff Have Proven Their Claim Of RM3,842,109.45 Being Expenditure And Costs Incurred For The Privatized Project Of The Defendant

[17] It is the court's finding that the plaintiff have duly proven their claim against the defendant that in developing and managing the said privatized project for the defendant, the plaintiff have incurred expenditure and costs including payment of professional consultancy fees, remuneration to the defendant's directors, office rental, renovation costs and purchase of two luxury cars for the use of defendant's two directors. From the oral testimony of plaintiff's witnesses and document any evidence adduced in court, plaintiff was proved to have engaged and appointed consulting

engineers, architects, planners, geologist and other professionals for the purpose of the said privatized project. According to PW1, although the proposal in exh. P5 was stated as had been prepared by the defendant, the technical drawings attached to the proposal were effectively prepared by the consulting architect who was appointed by the plaintiff for the project, namely Lak Akitek Sdn. Bhd.

[18] PW3, a partner in the consulting architect firm, had confirmed in court that his architectural firm, Akitek Suria was appointed by the plaintiff as a consulting architect for the said privatized project. The appointment of Akitek Suria by the plaintiff as a consulting architect for the project was evident in the minutes of the prepatory meetings that were regularly heid for the said privatized development project. According to PW3, his firm had completed 45% of the total professional architectural works for the project and that the architectural plans and drawings that his firm had prepared were attached as Annexure to the Privatization Development Agreement dated 8 November 1997. PW3 confirmed that his firm was engaged by PW1 to be one of the consulting architects in the privatization project in Seri Kembangan where the firm had prepared the required drawings for submission to the Selangor State Government. PW3 further confirmed that the computation of the firm's fees was based on 3% of the estimated value of work and that although his firm had completed 45% of the professional architectural works at the material time, no payment was received from the plaintiff.

According to PW3, PW1 had informed him that plaintiff was unable to pay his architectural firm due to the defendant's refusal to appoint the plaintiff for the project which had caused huge monetary losses to the plaintiff. In this regard, the defendant had clearly failed to disprove plaintiff's clear assertion that Akitek Suria was appointed by the plaintiff specifically for the project, that the firm had executed and prepared the necessary architectural drawings and plans required for the project's approval, and that the appointment and involvement of Akitek Suria and other consultants for the project during the extensive prepatory meetings were within the knowledge and consent of the defendant.

[19] PW4 a former project manager for Jurutera Konsult Maju Sdn Bhd had further confirmed in court that his engineering consulting firm was appointed by the plaintiff as one of the consulting engineers and project manager for the privatized project of the defendant. PW4 gave evidence of the numerous prepatory

meetings that were held at the plaintiff's office to discuss the "said privatized project" which were attended by representatives of both parties including PW1, PW3, PW4, defendant's director, Mazlin bin Aris and the consultants appointed for the project.

PW4 had confirmed in court that his firm had prepared the survey plans, drawings and had executed investigative survey and other prepatory works for the said privatized project which were undertaken from 1993, 1994 and 1995. PW4 gave detailed testimony of the prepatory survey works which include the preparation of plan and drawings on the relocation of the squatters affected by the privatized project. PW4 further testified that the computation of his firm's professional fees was based on 3% of the Mechanical and Engineering, Civil and Structural works and that although his firm had completed 50% of the total works, the firm have not received from the plaintiff any of the firm's professional fee amounting to RM1,140,707.50. According to PW4, he was informed by PW1 that the plaintiff was unable to pay their professional fees due to the defendant's failure to honour the agreement to appoint plaintiff to the project. PW4, who was responsible for the preparation of the minutes of the prepatory meetings in question, confirmed that the minutes that he had prepared were sent for verification to the consultants involved in the project and the defendant's director, Mazlin bin Aris.

[20] The appointment and involvement of other professionals in the prepatory works for the privatized project was also evident in the documents produced in court which included the quotation for the planning fees of ANZ Planners and the soil test fee by Jurukur Cekap Sdn Bhd. PW1 and PW4 gave evidence of 32 official meetings that were regularly held between representatives of both parties and the consultants appointed for the project for the period spanning from early 1996 to mid 1997 to discuss the project as in exh. P8. The meetings were attended by PW1, PW3, PW4 and PW5 and the defendant's director, Mazlin bin Aris at the plaintiff's office in Ampang. According to PW4 the drawings, reports, and plans that were prepared by the appointed consultants pursuant to these prepatory meetings, were submitted for the consideration and approval of the State Government.

In this respect, the court took judicial cognizance of a letter from the Selangor State Secretary dated 28 February 1995, exh. P6 which clearly awarded and appointed the defendant to develop the said privatized project. The subsequent Privatization Development Agreement dated 8 November 1997 which was eventually

executed between the Selangor State Government and the defendant confirmed plaintiff's claim that despite the defendant being awarded the privatized project from the Selangor State Government, the defendant have failed and refused to appoint the plaintiff to the project.

[21] Apart from the payment of professional fees to the consultants involved in the privatized project, in developing and managing the privatized project for the defendant, plaintiff had incurred other related expenses which included the payment of monthly directors fees of RM5,000 to defendant's directors, Tengku Putri and Mazlin bin Aris, totaling RM590,000. These monthly payment of RM10,000 were paid to the defendant's directors by the plaintiff for a considerably long period from February 1992 until January 1998 which were supported by the payment vouchers that were made out to the defendant's directors in exh. P20, P21, P22, P23, P24, P25 and P26. These payment vouchers consistently bore similar description bearing the words, "... pay to Tengku Mazlin bin Aris, dollars five thousand only being director's fees (salary or allowance) for the month ... received by Tengku Mazlin bin Aris on behalf of Tengku Putri Arafiah binti Sultan Salahuddin Abdul Aziz ..." . Plaintiff's managing director, PW1 gave clear unrebutted evidence of monthly payment made to the defendant's directors through Mazlin bin Aris and his testimony was supported by the considerable number of payment vouchers that were issued by the plaintiff to the defendant for the period from February 1992 to January 1998.

[22] PW1's evidence of the regular monthly payment of directors' allowances paid to the defendant's directors was further corroborated by the evidence of PW2, PW5 and PW6. PW6 gave evidence that she was informed by PW1 of plaintiff's commitment to pay fix monthly payment of RM5,000 to Tengku Putri and RM5,000 to Mazlin bin Aris for the said project. Plaintiff's ex employee PW2 who was responsible for the preparation and issuance of payment vouchers to defendant's directors, confirmed that on PW1's instruction she had prepared monthly payment vouchers to defendant's directors, Tengku Putri and Mazlin bin Aris, on the instruction of PW1.

[23] Although the plaintiff's payment vouchers did not bear the letterhead of the plaintiff company, but that of Bina Satu Sdn Bhd, the court accepted PW2's evidence that Bina Satu Sdn Bhd was essentially, the plaintiff's managing director's company which

was incorporated in mid 1992 and that, the plaintiff shared the same office with Bina Satu during it's early commencement. As the plaintiff did not have its own payment voucher, PW2 was directed by PW1 to use Bina Satu Sdn Bhd's voucher to effect the monetary payment to the defendant's directors, hence the usage of Bina Satu's payment vouchers in all of plaintiff's payment to the defendant's directors. The plaintiff's company secretary PW5, confirmed in court that he had regularly accompanied PW1 to the monthly meetings that were held for the project. At these meetings, payment was made by PW1 to Mazlin bin Aris the amount of which he could not confirm but that it exceeded RM500,000. PW5 further confirmed that there were occasions where the plaintiff made payment of substantial sum to the defendant upon request by Mazlin bin Aris, purportedly for the purpose of the project. Both PW1 and PW5 confirmed that the plaintiff's payment to the defendant were made through defendant's authorized representative, Mazlin bin Aris on the instruction and with the knowledge and consent of the defendant's director, Tengku Putri.

[24] Apart from these monthly directors' fees, PW1 gave evidence of other payment made to the defendant through Mazlin bin Aris, purportedly to settle matters relating to the project amounting respectively RM90,000, RM100,000, RM200,000, RM100,000 as exhibited in plaintiff's payment vouchers in exh. P15, P16, P17 and P18. PW1 however admitted that he had no knowledge of the purpose for which payment was required of him by Mazlin bin Aris as according to PW1, the meetings with the Selangor State Government were attended by the defendant's representative. Evidence of the substantial payment that were made by the plaintiff to Mazlin bin Aris was corroborated by PW5, who accompanied PW1 during the meetings when payment were made to Mazlin bin Aris. According to PW5, as the payment involved substantial amount, PW5 had to wait for a considerable period as enable Mazlin bin Aris to count the money before he signed the plaintiff's payment vouchers. In the absence of rebuttal evidence by the defendant to disprove these clear oral testimony and documentary evidence of the plaintiff's witnesses, the court accepted plaintiff's assertion of considerable cost and expenses that were incurred by the plaintiff for the purpose of the said privatized project that was subsequently awarded to the defendant.

[25] In preparation of the said privatized project, the plaintiff had also incurred other expenditure in the purchase of two luxury cars namely a Mercedes Benz 300 SLA registration number WDU 1233 costing RM283,514 and a BMW 318(A) bearing registration number BDW 6176 costing RM160,789 as evident in the receipts in exh. P30 and P31. According to PW1, the defendant requested that the plaintiff provided the cars to their directors for the use of the said privatized project where the handing over of the cars were witnessed by PW5. The cars were subsequently returned to the plaintiff on 24 September 1998 by the defendant's director, Mazlin bin Aris where PW6 acknowledged the receipt of both cars in a letter in exh. P35.

Defendant's Contention

[26] The defendant had contended that the parties' resolutions in exh. P2, P3, P37 and P38 were vague and that the project that was awarded to the defendant by the Selangor State Government were materially different from the project that was agreed to by the parties in the resolutions. The defendant further contended that the parties' company resolutions were not intended to be legally binding and that the resolutions merely contained terms as basis for the negotiation of another (privatization) agreement. In this regard, the court took notice that exh. P5 was an approval that was made in respect of a proposed housing development project on Lot 2829, Kg Aman, Seri Kembangan, Selangor. Pursuant to the approval letter by the Selangor State Government dated 28 February 1995 to award the privatized project to the defendant, the project was further expanded which resulted in changes to the description and size of the project as exhibited in the approval letter by Petaling District Council dated 18.5.1997 exh. P7 and P40. In any event, the project that was the subject matter of the parties' company resolutions at P2, P3, P37 and P38 was generally described as "Project For Privatisation of Wholesale Market and Cinema at Bandar Seri Kembangan, Selangor ..." whilst the approval letters from the Petaling District Council in P6, P7 and P40 were similarly described, namely "... a wholesale market and commercial complex comprising of ... a cinema ..." . Again, the defendant failed to adduce evidence nor produce material witness to explain and support their contention of purported "material difference" between the privatized project that was referred to in the parties' resolutions from that which

was awarded to the defendant by the State Government in the Privatization Agreement dated 8 November 1997. Thus, in the absence of rebuttal evidence from the defendant, the court is of the view that the privatized project that was approved and awarded by the Selangor State Government to the defendant was in respect of the same privatized project as was referred in both the plaintiff's and defendant's company resolutions at P2, P3, P37 and P38.

[27] As to the defendant's contention that the agreed resolutions were subjected to the execution of a further formal contract between parties, based on both, the parties conduct and the circumstances surrounding the parties' resolutions, the court is of the view that both parties had intended to create a legal relation and execute a legally binding agreement for the purpose of the project. The defendant failed to secure the attendance of their directors to give evidence in court. No proof of attempt that was made for the witnesses to be located, particularly Tengku Putri and Mazlin bin Aris to rebut plaintiff's case does not shift the burden to the plaintiff to produce these witnesses. Pursuant to s. 103 of the Evidence Act 1950, the onus is clearly on the defendant and not the plaintiff, to produce defendant's directors, Tengku Putri, Mazlin bin Aris or defendant's solicitor, Mr Palaya. Mr, Palaya who allegedly attended a meeting with PW1, PW5, PW6, DW1 and defendant's director, Tengku Putri where payment of compensation to the plaintiff, was discussed. There is clearly no legal obligation for the plaintiff to produce these vital witnesses and that in failing to produce these witnesses, the defendant failed to rebut plaintiff's assertion of defendant's clear breach of the resolutions in question.

[28] Further, it was also clear to the court that the defendant's sole witness, DW1 was not involve nor possess any material knowledge of the parties earlier understanding in 1993 for the plaintiff to develop the privatized project for the defendant. DW1 only became involved with the defendant upon his purchase of Mazlin bin Aris's shares on 19 April 1999 for a sum of RM3 million. DW1 conceded in court that he had paid RM150,000 to PW1 for the purpose of assisting PW1's daughter's education in Australia. However, DW1's voluntariness and readiness in providing monetary assistance to the plaintiff's managing director remained speculative. In the light of clear oral testimony from

plaintiff's witnesses that payment of RM150,000 was made by DW1 to the plaintiff for the costs incurred for the said project, DW1's "generosity" in advancing RM150,000 for PW1's daughter's education appear to be self-serving and actuated by other ulterior motive.

[29] The police report lodged by the Tengku Putri against Mazlin bin Aris on the ground that Mazlin bin Aris had unlawfully used her name to collect money from the plaintiff is an apparent afterthought and self serving. In this regard, in the light of the overwhelming evidence pointing to her involvement, I find that the lodgement of the police report by Tengku Putri against Mazlin bin Aris, dubious and questionable. The police report that was lodged by Tengku Putri appear to support plaintiffs' claim that the payment made by the plaintiff for the project was with the knowledge of defendant's director, Tengku Putri, Mazlin bin Aris was clearly the defendant's authorized representative for the purpose of the project and was appointed the alternative director for the defendant's director, Tengku Putri pursuant to the plaintiff's resolution in P2. Mazlin bin Aris was significantly appointed the defendant's director on 19 April 1995 as exhibited in P4 and was the defendant's largest shareholder. The police report of the defendant's Tengku Putri does not exculpate defendant's clear liability to the plaintiff in the light of clear oral testimony from plaintiff's six witnesses and the unrebutted documentary evidence adduced before this court.

[30] Based on the above, it was clear that the plaintiff in anticipation of the defendant being awarded the privatized project by the Selangor State Government, had initiated and executed prepatory works for the privatized project for the defendant in which considerable expenses were incurred by the plaintiff in the course of the development of the said privatized project. The evidence adduced in its entirety, proved that the defendant had breached the parties' understanding which had occasioned severe financial losses to the plaintiff. The court accordingly allowed the plaintiff's claim prayed in paras. 10(b), (c), (d) in the amount of RM2.5 million with interest and cost.

[31] As regard to the amount of damages, an amount of RM2.5 million is awarded to the plaintiff which the court considered as a fair and reasonable amount in the light of documentary and oral testimony of the witnesses. Apart from PW3 and PW4, not all of

A the consulting professionals engaged by the plaintiff for the project were called to give evidence to support and explain the computation of the expenses including ID33A, ID33D and ID33E which remained unproved nor was the purported renovation costs of the office space explained in court. As for the plaintiff's claim
B for the purchase of two "luxury" cars for the use of defendant's directors, no evidence of the estimated market value of these cars were adduced before the court. Further, the tenancy agreement in respect of rental charges incurred by Bina Satu Sdn Bhd for the said project was not tendered in court to support plaintiff's claim.
C In computing and ascertaining the amount to be awarded to the plaintiff, the sum of RM2.5 million was not manifestly excessive, and is considered a reasonable and fair amount.

[32] Therefore having considered the evidence in its entirety and
D the submission of both parties, judgment is accordingly entered for the plaintiff in the sum of RM2.5 million as per prayer ten of the writ of summons, plaintiff is further granted interest at the rate of 8% per annum on the said sum from the date of the writ of summons until the date of full realization and costs.

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